

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
BRIEF**

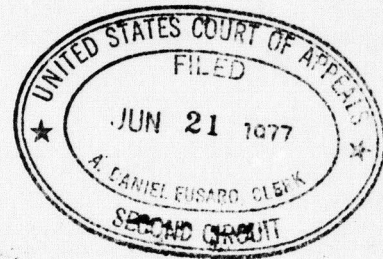
77-1123

To be argued by
STEVEN LLOYD BARRETT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
:
Plaintiff-Appellee,
:
-against-
:
JOSE NUNEZ,
:
Defendant-Appellant.
:
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Docket No. 77-1123



SUPPLEMENTAL BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
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SUPPLEMENTAL BRIEF FOR APPELLANT

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ARGUMENT

(Supplementing Point I)

On May 23, 1977, the Supreme Court announced its decision in United States v. Rose Wong, ___ U.S. ___, 45 U.S.L.W. 4464.* This decision reversed the Ninth Circuit's holding that a target of a grand jury investigation, called before that grand

*A copy of the decision, as published in The United States Law Week, is annexed hereto as "A".

jury, must be effectively advised of his constitutional rights under the Fifth Amendment before being questioned.* The Court held that ineffective warnings on the privilege against self-incrimination could not justify perjurious testimony before the grand jury, perjury not being a "permissible alternative." This rendered one question addressed by the Ninth Circuit -- the adequacy of the warnings given -- academic to the Supreme Court's resolution of the case; but consequently, that portion of the Ninth Circuit's decision which considered the adequacy of the warnings was not overruled.

A consideration of the facts in United States v. Rose Wong relating to the adequacy of the warnings Ms. Wong was given and of the Ninth Circuit's analysis on that point is pertinent to our claim that appellant Nunez was not given adequate Miranda warnings. Rose Wong was born in China, but came to the United States as a child, and attended San Francisco public schools for the first eight grades of elementary education. She was called before a federal grand jury and advised of her Fifth Amendment rights in Miranda-warning fashion, but only in English; she was then asked questions in English and responded in English. In the district court, she established that her limited facility in English prevented her from understanding the

*The decision of the Ninth Circuit was filed as an unpublished opinion. A copy of it is annexed hereto as "B."

true nature of her Fifth Amendment rights, and the Ninth Circuit Court of Appeals accepted that determination. Thus, the court concluded that, notwithstanding Ms. Wong's background and English responses to English questions, English warnings were not adequate.

Since the adequacy of the Miranda warnings is central to the case at bar, the following observations of the Ninth Circuit are apposite:

But before such information can be compelled, the danger created by compelling answers to incriminatory questions from a putative defendant must be thoroughly obviated by an effective warning of the right to remain silent. As the warning given here was not effective,⁴ because not understood, the unfairness of the procedure remained undisipated, and due process requires the testimony be suppressed.

⁴ We do not intimate that the government acted in bad faith. On the contrary, the government's attorney carefully informed appellee of her rights and believed she understood them. Nevertheless, the government having employed a procedure calculated to exploit her lack of understanding, it runs the risk of a subsequent determination that its curative procedures were inadequate and the due process violation undissipated.

For similar reasons, appellant Nunez was not effectively advised of his constitutional rights, and his statement should be suppressed.

CONCLUSION

For the foregoing reasons and the reasons set forth in the main brief for appellant, the judgment of the district court should be reversed.

Respectfully submitted,

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June 16, 1977

Full Text of Opinions

No. 74-635

United States, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Appeals
Rose Wong. | for the Ninth Circuit.

[May 23, 1977]

Syllabus

A witness who is called to testify before a grand jury while under investigation for possible criminal activity, and is later indicted for perjury in the testimony given before the grand jury, is not entitled to suppression of the false testimony on the ground that no effective warning of the Fifth Amendment privilege to remain silent had been given.

(a) The Fifth Amendment testimonial privilege does not condone perjury, which is not justified by even the predicament of being forced to choose between incriminatory truth and falsehood, as opposed to a refusal to answer. *United States v. Knott*, 396 U. S. 77; *United States v. Mandujano*, 425 U. S. 564.

(b) Nor do Fifth Amendment due process requirements require suppression, since even where searching questions are made of a witness uninformed of the Fifth Amendment privilege of silence, "[o]ur legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." *Bryson v. United States*, 396 U. S. 64, 72.

— F. 2d —, reversed and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether a witness who is called to testify before a grand jury while under investigation for possible criminal activity, and who is later indicted for perjury committed before the grand jury, is entitled to have the false testimony suppressed on the ground that no effective warning of the Fifth Amendment privilege to remain silent was given.¹

(1)

Rose Wong, the respondent, came to the United States from China in early childhood. She was educated in public schools in San Francisco, where she completed eight grades of elementary education. Because her husband does not speak English, respondent generally speaks in her native tongue in her household.

In September 1973 respondent was subpoenaed to testify before a federal grand jury in the Northern District of California. The grand jury was investigating illegal gambling and obstruction of state and local law enforcement in San Francisco. At the time of her grand jury appearance, the Government had received reports that respondent paid bribes to two undercover San Francisco police officers and agreed to make future payments to them. Before any interrogation began, respondent was advised of her Fifth

¹ In *United States v. Mandujano*, 425 U. S. 564 (1976), we held that false testimony by a grand jury witness suspected by federal prosecutors of criminal involvement was admissible in a subsequent perjury trial. Although the witness in *Mandujano* had been warned of the Fifth Amendment privilege, the Court of Appeals had mandated suppression of the perjurious testimony on the ground that the witness had not been provided with full *Miranda* warnings. In this Court, three separate opinions expressed varying reasons, but all eight participating Justices agreed that the perjured testimony was improperly suppressed.

Amendment privilege;² she then denied having given money or gifts to police officers or having discussed gambling activities with them. It is undisputed that this testimony was false.

(2)

Respondent was indicted for perjury in violation of 18 U. S. C. § 1623. She moved to dismiss the indictment on the ground that, due to her limited command of English, she had not understood the warning of her right not to answer incriminating questions. At a suppression hearing, defense counsel called an interpreter and two language specialists as expert witnesses and persuaded the District Judge that respondent had not comprehended the prosecutor's explanation of the Fifth Amendment privilege;³ on the contrary, the court accepted respondent's testimony that she had thought she was required to answer all questions. Based upon informal oral findings to this effect, the District Court ordered the testimony suppressed as evidence of perjury.

Accepting the District Court's finding that respondent had not understood the warning, the Court of Appeals held that due process required suppression where "... the procedure employed by the government was fraught with the danger ... of placing [respondent] in the position of either perjuring or incriminating herself." — F. — (CA9 1974). Absent effective warnings of the right to remain silent, the court concluded, a witness suspected of criminal involvement by the Government will "... not understand the right to remain silent, and [will] be compelled by answering to subject himself to criminal liability." *Id.*, at —. In the Court of Appeals' view, the ineffectiveness of the prosecutor's warning meant that "the unfairness of procedures remained undissipated and due process requires the testimony be suppressed." *Id.*, at —.

Following our decision in *United States v. Mandujano*, *supra*, we granted certiorari. 426 U. S. 905 (1976). We now reverse.

(3)

Under findings which the Government does not challenge, respondent, in legal effect, was unwarned of her Fifth Amendment privilege. Resting on the finding that no effective warning was given, respondent contends that both the Fifth Amendment privilege and Fifth Amendment due process require suppression of her false testimony. As to her claim under the Fifth Amendment testimonial privilege, respondent argues that, without effective warnings, she was in effect forced by the Government to answer all questions, and that her

² The prosecutor gave respondent the following warnings:

"You ... need not answer any question which you feel may ... incriminate you. ... [Y]ou [have] the right to refuse to answer any question which you feel might incriminate you. ... [I]f you do give an answer, that answer may be used against you in a subsequent criminal prosecution, if in fact the Government should decide to prosecute you for any crime. ... You also have the right to consult with an attorney prior to answering any question here today. ... [I]f you cannot afford an attorney, ... we would see that an attorney is afforded [sic] to represent you. ... [I]f you do answer any questions and should you knowingly give any false testimony, or false answers to any questions, you would be subject to prosecution for the crime of perjury under the Federal Laws." Tr., at 52-53.

³ The District Court found, however, that respondent understood the oath and the consequences of giving false testimony, and that she understood the questions that were asked of her. Thus, no issue regarding the due process consequences, if any, of the absence of either factor was addressed by the District Court or the Court of Appeals.

choice was confined either to incriminating herself or lying under oath. From this premise, she contends that such testimony, even if knowingly false, is inadmissible against her as having been obtained in violation of the constitutional privilege. With respect to her due process claim, she contends, and the Court of Appeals held,¹ that absent warnings a witness is placed in the dilemma of engaging either in self-incrimination or perjury, a situation so inherently unfair as to require suppression of perjured testimony. We reject both contentions.

As our holding in *Mandujano* makes clear, and indeed as the Court of Appeals recognized, the Fifth Amendment privilege does not condone perjury. It grants a privilege to remain silent without risking contempt, but it "does not endow the person who testifies with a license to commit perjury." *Glickstein v. United States*, 222 U.S. 139, 142 (1911). The failure to provide a warning of the privilege, in addition to the oath to tell the truth, does not call for a different result. The contention is that warnings inform the witness of the availability of the privilege and thus eliminates the claimed dilemma of self-incrimination or perjury. Cf. *Garner v. United States*, 424 U.S. 648, 657-658 (1976). However, in *United States v. Knox*, 396 U.S. 77 (1969), the Court held that even the predicament of being forced to choose between incriminatory truth and falsehood, as opposed to refusing to answer, does not justify perjury. In that case, a taxpayer was charged with filing false information on a federal wagering tax return. At the time of the offense, federal law commanded the filing of a tax return even though the effect of that requirement, in some circumstances, was to make it a crime not to supply the requested information to the Government.² To justify the deliberate falsehood contained in his tax return, Knox, like respondent here, argued that the false statements were not made voluntarily, but were compelled by the tax laws and therefore violated the Fifth Amendment. The Court rejected that contention. Although it recognized that tax laws which compelled filing the returns injected an "element of pressure into Knox's predicament at the time he filed the forms," *id.*, at 82, the Court held that by answering falsely the taxpayer took "a course that the Fifth Amendment gave him no privilege to take." *Ibid.*

In this case respondent stands in no better position than Knox; her position, in fact, is weaker since respondent's refusal to give inculpatory answers, unlike Knox, would not have constituted a crime. It follows that our holding in *Mandujano*, that the Fifth Amendment privilege does not protect perjury, is equally applicable to this case.

(5)

Respondent also relies on the Court of Appeals' holding that the failure to inform a prospective defendant of the constitutional privilege of silence at the time of a grand jury appearance is so fundamentally unfair as to violate due process. In the Court of Appeals' view, the Government's conduct in this case, although in good faith, so thwarted the adversary model of our criminal justice system as to require

¹ The Court of Appeals rejected respondent's argument that the Fifth Amendment privilege required suppression. The court held:

"[T]he privilege against self-incrimination does not afford a defense to a witness under compulsion who, rather than refusing to answer (or, if improperly compelled to answer, giving incriminating answers), gives false testimony." —F. 2d —.

² Knox filed the false return prior to this Court's decisions in *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968).

suppression of the testimony in any subsequent perjury case based on the falsity of the sworn statement.³ We disagree.

First, the "unfairness" urged by respondent was also present in the taxpayer's predicament in *Knox*, yet the Court there found no constitutional infirmity in the taxpayer's conviction for making false statements on his returns. Second, accepting *arguendo* respondent's argument as to the dilemma posed in the grand jury procedures here,⁴ perjury is nevertheless not a permissible alternative. The "unfairness" perceived by respondent is not the act of calling a prospective defendant to testify before a grand jury⁵ but rather the failure effectively to inform a prospective defendant of the Fifth Amendment privilege. Thus, the core of respondent's due process argument, and of the Court of Appeals' holding, in reality relates to the protection of values served by the Fifth Amendment privilege, a privilege which does not protect perjury.

Finally, to characterize these proceedings as "unfair" by virtue of inadequate Fifth Amendment warnings is essentially to say that the Government acted unfairly or oppressively by asking searching questions of a witness uninformed of the privilege. But, as the Court has consistently held, perjury is not a permissible way of objecting to the Government's questions. "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." *Bryson v. United States*, 396 U.S. 64, 72 (1969); *United States v. Mandujano*, *supra*, at 577, 585 (BRENNAN, J., concurring in the judgment), 609 (STEWART, J., concurring in the judgment). Indeed, even if the Government could, on pain of criminal sanctions, compel an answer to its incriminating questions, a citizen is not at liberty to answer falsely. *United States v. Knox*, *supra*, at 82-83. If the citizen answers the question, the answer must be truthful.

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

WILLIAM F. SHEEHAN, Assistant to the Solicitor General (ROBERT H. BORK, Solicitor General, HENRY E. PETERSEN, Assistant Attorney General, ROBERT B. REICH, Assistant to the Solicitor General, PETER M. SHANNON, JR., and LAUREN S. KAHN, Justice Dept. attorneys, with him on the brief) for petitioner; ALLAN BROTSKY, San Francisco, California, for respondent.

³ The Court of Appeals did not suggest why, assuming a due process violation had occurred, suppression of respondent's testimony was constitutionally required.

⁴ Cf. *United States v. Mandujano*, 425 U.S. 564, 594-598 (BRENNAN, J., concurring in the judgment).

⁵ There is no constitutional prohibition against summoning potential defendants to testify before a grand jury. *United States v. Dionisio*, 410 U.S. 1, 10 n. 5 (1973); *United States v. Mandujano*, *supra*, at 584 n. 9, 594 (BRENNAN, J., concurring in the judgment). The historic availability of the Fifth Amendment privilege in grand jury proceedings, *Counselman v. Hitchcock*, 142 U.S. 547 (1892), attests to the Court's recognition that potentially incriminating questions will frequently be asked of witnesses subpoenaed to testify before the grand jury; the very purpose of the inquiry is to ferret out criminal conduct, and sometimes potentially guilty persons are prime sources of information.

APPENDIX A

United States Court of Appeals for the Ninth Circuit
No. 74-1636

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ROSE WONG, DEFENDANT-APPELLEE

September 23, 1974

Appeal from the United States District Court for the
Northern District of California

OPINION

Before: KOELSCH and SNEED, *Circuit Judges*, and
FIRTH,* *District Judge*.

KOELSCH, *Circuit Judge*:

Appellee was subpoenaed to testify before the Grand Jury investigating illegal gambling and police payoffs in the Chinatown area of San Francisco. At that time the government already possessed incriminating evidence against her; she was a target of the Grand Jury's investigation and likely to be indicted.¹

*The Honorable Robert Firth, United States District Judge for the Central District of California, sitting by designation.

¹ At the hearing the government's attorney acknowledged, and the district court found, that before appellee was subpoenaed, the government possessed testimony of two cooperating undercover San Francisco police officers that they had visited appellee at her illegal gambling house, that she had paid them bribes, and arranged for future payments; she was therefore a prospective defendant when called to testify.

Immediately before questioning appellee, the district attorney informed her of her privilege against self-incrimination, and of the possible consequences of testifying falsely. He then asked questions, tailored by his previously obtained knowledge of appellee's criminal involvement, true answers to which would have been incriminating. Appellee's false answers formed the basis for a subsequent perjury indictment. 18 U.S.C. § 1623.

Following her arraignment on the charge, appellee moved to suppress her answers. The district court determined, based on extensive evidence adduced by affidavit and at a hearing, that appellee, who was born in China and uses English only as a second language, had not understood that portion of the prosecutor's questioning designed to inform her of her right to remain silent.² Consequently the district court, relying on *United States v. Rangel*, 365 F. Supp. 155 (W.D. Tex. 1973), and the implications of statements in our decision in *Robinson v. United States*, 401 F. 2d 248 (9th Cir. 1968), ordered the testimony suppressed. The government has appealed. We affirm.

We emphasize at the outset that affirmance is rested not on the self-incrimination clause, but rather on the due process clause of the Fifth Amendment. The prejudicial answers were induced by an unfair procedure violative of the latter clause. That unfairness stems from the threat the procedure poses to the values protected by the privilege.

The government correctly points out that the privilege against self-incrimination does not afford a defense to a witness under compulsion who, rather than refusing to answer (or, if improperly compelled

² The district court's resolution of the conflicting evidence is not clearly erroneous, and we are bound by the determination that she did not understand her rights.

to answer, giving incriminating answers), gives false testimony. *E.g.*, *United States v. Knox*, 396 U.S. 77 (1969); *Glickstein v. United States*, 222 U.S. 139 (1911); *Robinson v. United States*, *supra*; *United States v. Orta*, 253 F. 2d 312 (5th Cir. 1958); *United States v. Parker*, 244 F. 2d 943 (7th Cir. 1957). The reason is fundamental: "The immunity afforded by the Constitutional guaranty relates to the past, and does not endow the person who testifies with a license to commit perjury." *Glickstein*, *supra*, at 142. Because the judicial system is committed to interpreting the privilege against self-incrimination generously obviating totally the danger of oppressive governmental conduct both to those who remain silent and to those who unwillingly incriminate themselves because of improper governmental compulsion, the legal system reciprocally need not and cannot tolerate perjury. If a witness is improperly compelled to incriminate himself, he may do so and later be protected, but he may not avoid the object of the compulsion by perjury and be protected by the privilege (*United States v. Knox*, *supra*, at 82)—the judicial system cannot properly operate if it countenances the breach of trust implicit in that course. *See United States v. Orta*, *supra*, at 314-15.

But that principal is inapplicable to this matter. We cannot ignore the fact that the procedure employed by the government was fraught with the danger, if indeed not intended, of placing appellee in the position of either perjuring or incriminating herself. We agree with the Fifth Circuit that the government's use of such a procedure against a witness it knows to be virtually in the position of a defendant is unfair, unless accompanied by warnings which in fact apprise the witness of the right to remain silent and which thoroughly obviate the substantial danger created of

involuntary self-incrimination or perjury, and that the induced perjured testimony must be suppressed. *United States v. Rangel*, 496 F. 2d 1059 (5th Cir. 1974); *United States v. Mandujano*, 496 F. 2d 1050 (5th Cir. 1974). See *United States v. Kreps*, 349 F. Supp. 1049 (W.D. Wisc. 1972); *United States v. Fruchtman*, 282 F. Supp. 534 (N.D. Ohio 1968); *United States v. Thayer*, 214 F. Supp. 929 (D. Colo. 1963).

Unlike the situation with an ordinary witness,³ the government knows in advance that when it subpoenas someone in appellee's position, a so-called "putative defendant," and asks directly incriminating questions, it is thereby placing the witness in a dangerous dilemma. The imposing ex parte nature of grand jury inquisitions, coupled with the predictable ignorance of many lay witnesses about the intricacies of the privilege against self-incrimination, creates a foreseeable probability that the witness will subject himself to criminal liability. Subpoenaing and questioning a witness under such circumstances is a form of governmental compulsion seeking to incriminate a witness out of his own mouth which threatens to circumvent the independent prosecutorial model mandated by the privilege. We cannot ignore the obvious fact that, while a few witnesses placed in such a position might honestly wish to confess, in the great majority of cases asking incriminating questions of a putative defendant, were the witness fully informed of his rights, would be an idle task, as the witness would

³ While *Rangel* and *Mandujano* are the only precedents directly in point, prior decisions refusing to suppress perjury have intimated that the result reached would be different if the questions had been asked of a putative defendant. See, e.g., *Robinson, supra*, at 250; *Orta, supra*, at 314; *Parker, supra*, at 946-49.

simply remain silent. The utility of the procedure to the government, and its inherent unfairness and danger, lies in the wholly predictable fact that the witness will be ignorant of or not understand the right to remain silent, and be compelled by answering to subject himself to criminal liability. The government should not engage in such a practice.

We do not hold that the government may not question a putative defendant. Some witnesses may indeed wish voluntarily to confess, and all may have non-privileged information useful to the grand jury's task—witnesses have no privilege per se to refrain from giving incriminatory information against others. But before such information can be compelled, the danger created by compelling answers to incriminatory questions from a putative defendant must be thoroughly obviated by an effective warning of the right to remain silent. As the warning given here was not effective,⁴ because not understood, the unfairness of the procedure remained undissipated, and due process requires the testimony be suppressed.

The judgment is affirmed.

⁴We do not intimate that the government acted in bad faith. On the contrary, the government's attorney carefully informed appellee of her rights and believed she understood them. Nevertheless, the government having employed a procedure calculated to exploit her lack of understanding, it runs the risk of a subsequent determination that its curative procedures were inadequate and the due process violation undissipated.

CERTIFICATE OF SERVICE

June 16, 1977

^{supplemental}

I hereby certify that a copy of this ^{supplemental} brief [REDACTED]
[REDACTED] has been mailed to the United States Attorney
for the Eastern District of New York.

Steven R. G. [Signature]